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IN THE SUPREME COURT OF FLORIDA

J. F. TAYLOR, J. WINSTON KELSEY AND J. M. ANDREWS, AS TRUSTEES OF THE LAKE PLACID METHODIST CHURCH,

Appellants,

vs.

MARY EMMA PAYNE, AS ADMINISTRATRIX DE BONIS NON, CUM TESTAMENTO ANNEXO,

Appellee.

STATEMENT OF BASIS OF APPELLATE JURISDICTION AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, paragraph 1, J. F. Taylor, J. Winston Kelsey and J. M. Andrews, as Trustees of the Lake Placid Methodist Church, the above named appellants, file this their Statement, particularly disclosing the basis on which said appellants contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein:

(a) The statute believed to sustain the appellate jurisdiction is Section 344 of Title 28, par. (a) U. S. C. A., which provides that:

> "A final judgment or decree in any suit in the highest Court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of the United States, and the deci-

sion is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

(b) The statute of the State of Florida the validity of which is involved is Section 20 of Chapter 16103 Laws of Florida, 1933, the same being Section 731.19 F. S. A., said statute being in words and figures as follows:

"If a testator dies leaving issue of his body, or an adopted child, or the lineal descendants of either, or a spouse, and the will of such testator devises or bequeaths the estate of such testator or any part thereof, to a benevolent, charitable, literary, scientific, religious or missionary institution, corporation or association or purpose, or to this state, or to any other state or country, or to a county, city or town in this or any other state or country, or to a person in trust for any such purpose or beneficiary, whether such trust appears on the face of the instrument making such devise or request or not, such will as to such devise or bequest shall be invalid unless it was duly executed at least six months prior to the death of the testator."

(c) The judgment sought to be reviewed was entered April 21, 1944; the date of denial of petition for rehearing was May 12, 1944; and the date of application for appeal is May 29, 1944.

(d) The history of the case is as follows:

P. T. Richards executed his last will and testament on the 6th day of September, 1938. Paragraph numbered "2" of the will (Tr. 4) now in question is as follows:

> "I give, devise and bequeath to my beloved wife Isabelle, all of the income of my property, real or personal, or mixed, wheresoever located and of whatsoever kind. Upon her death, after the payment of any debts which she may owe, if there still remains balances due upon the contract I made with B. E. Alderman, and upon the mortgage given me by William, Hubert and Harvey Roberts I direct that such balance due be and become the property of the Trustees of the Lake Placid Methodist Church, to be used by them for the purpose of repairing and painting the building on the church property, and for no other purpose."

The testator departed this life on the 30th day of October, 1938, leaving his wife, Isabelle Richards, as his sole and only heir and chief legatee of his will. The will was duly admitted to probate in Highlands County, Florida, on the 5th day of December, 1938. Thereafter, the widow of the testator died, and Mary Emma Payne was appointed as Administratrix with the will annexed of the goods not administered, among which was the contract and mortgage referred to in the above quoted paragraph of the will. On September 16, 1941, the appellants filed their petition in the County Judge's Court of Highlands County, Florida, setting forth the above facts, to which was attached and made a part of the petition a copy of the will referred to (R. 1-5). The administratrix (the petition alleges) contends that the provisions of the will with reference to the petitioners (appellants) are null and void by reason of the fact that the will was executed by the deceased within six months of the time of the death of the testator, and bases her contention upon Section 20 of Chapter 16103, Laws of Florida, Acts of 1933,

known and cited as the "Probate Act" (731.19 F. S. A.). The petition prays for an accounting to the petitioners and the distribution to them of the proceeds of the contract and mortgage referred to, according to the quoted provisions of the will.

On December 22, 1941, the administratrix filed a motion to dismiss the petition (R. 6). On June 19, 1942, the County Judge entered an order sustaining the motion to dismiss the petition, and dismissed the same without leave to amend (R. 7). Thereafter, on the 9th day of July, 1942, the petitioners gave notice of appeal to the Circuit Court (R. 8), assigning the following as errors:

> "1. The Court erred in its order of June 19, 1942, sustaining the motion of the administratrix to dismiss the petition of petitioners.
>
> 2. The Court erred in dismissing the petition of petitioners.
>
> 3. The Court erred in holding that Section 20 of Chapter 16103, Laws of Florida, Acts of 1933, is not conflict with Sections I and XII of the Declaration of Rights of the Constitution of Florida and Section I of the Fourteenth Amendment of the Constitution of the United States."

Thereafter, the said appeal was heard upon due notice within the time fixed by order of the court; and the court thereupon took the said matter under advisement until October 26, 1943, upon which time he entered his order affirming the judgment of the County Judge's Court (Tr. 10, 11). This order contained the following paragraph:

> "It Is Further Ordered, Adjudged and Decreed that the charitable devisees and bequests to the Trustees of the Lake Placid Methodist Church and the Methodist Episcopal Church South Florida Conference contained in the Will of P. T. Richards be

and the same are hereby declared invalid as being within the provisions in Section 20 of the Probate Act of 1933."

Thereupon appellants pursued their appeal to the Supreme Court of the State of Florida, assigning as error the following:

"I. The Court erred in its judgment and order of October 26, 1943, affirming the final judgment of the County Judge's Court.

II. The Court erred in declaring the bequests in the Will of P. T. Richards to the Trustees of the Lake Placid Methodist Church invalid, as being in conflict with the provisions of Section 20 of the Probate Act of 1933.

III. The Court erred in holding Section 20 of the Probate Act of 1933 to be in accord with the declaration of rights of the Constitution of Florida, and of Section I of the XIVth Amendment to the Constitution of the United States."

On April 21, 1944, the Supreme Court of Florida affirmed the judgments of the lower courts, and the appeal now sought to be made is to the Supreme Court of the United States upon the errors set forth in the assignment herewith filed.

(e) The following facts will be observed:

1. The refusal of the County Judge to entertain the petition of appellants was a refusal of a right guaranteed to them by Florida Law (Sec. 732 F. S. A.).

2. The dismissal of their petition without leave to amend was a denial of their right to be heard. (All pleadings are amendable under Florida Law. Section 63.26 F. S. A.).

Hovey v. *Elliott*, 167 U. S. 409;
Windsor v. *McVeigh*, 93 U. S. 274;
Edwards v. *U. S.*, 61 St. Ct. 669.

3. The testator had a right under the laws of Florida to make a will, and a statutory right is "property" protected by the Fourteenth Amendment to the United States Constitution; he had exercised that right and executed a will, which under the statute was valid at the time of its execution and up until the event of his death; his will was property protected by the said amendment; the statute in question destroyed its validity, upon the happening of an event he could not possibly foresee or prevent. The statute therefore destroyed the rights and property of the testator without due process.

4. To deprive religious institutions of the right to become the beneficiaries of testators, unless such testators live for more than six months after the execution of a will, and to permit all others to take such benefits (except the few named in said statute) unreasonably discriminates against religious institutions, and permits irreligious institutions, atheistic institutions, etc., to become beneficiaries. Such discrimination is a denial of due process and of the equal protection of said law.

5. The testator by the operation of said law was prohibited from the free exercise of his religion, in that said law struck down a gift made to his church as a part of his worship and denied such church the right to receive such gift, merely because the testator died within six months from the time of the making of the same; and the same is contrary to the First Amendment to the United States Constitution.

28 R. C. L. 68-69;
11 Am. Jur. 1136-37, 1141-1144;
12 C. J. 945, 955;
In re Rice's Will, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778;

Patton v. *Patrick*, 123 Wis. 218, 221; 101 N. W. 408;
Yeager v. *State*, 78 Fla. 354, 83 So. 525;
Murdock v. *Commonwealth of Pennsylvania*, 63 S. Ct. 870;

(*f*) A copy of the opinion of the Supreme Court of Florida in the case at bar is hereto attached and made a part of this jurisdictional statement as if set forth herein *haec verba.*

W. D. Bell, Attorney for Appellants.

IN THE SUPREME COURT OF FLORIDA—JANUARY TERM A. D. 1944.

En Banc

J. F. Taylor, J. Winston Kelsey and J. M. Andrews, as Trustees of the Lake Placid Methodist Church, *Appellants,*

vs.

Mary Emma Payne, as Administratrix De Bonis Non-Cum Testamento Annexo, *Appellee.*

Opinion filed April 21, 1944

An Appeal from the Circuit Court for Highlands County. D. C. Rogers, Judge.

W. D. Bell, for appellants.

Joe D. Kinsey, Howard C. Livingston, Kinsey & Livingston and Ausley, Collins and Ausley, for Appellee.

Sebring, *J.*

P. T. Richards died testate leaving no issue of his body, or adopted children, or lineal descendants of either, surviving him. His last will and testament was executed within six months prior to his death. His widow, Isabelle, was appointed by his will to serve as executrix without bond. At the time of his death Richards was the owner of a certain contract and a certain mortgage, the exact nature of which is not shown by the record, but upon which installments of money were payable to the owner from time to time. By a provision of his will the testator bequeathed to his widow, for life, any proceeds derived from the contract and mortgage during her lifetime, with directions that at her death any balance then due, or thereafter to become due, on the same should be and become the property of the Trustees of the Lake Placid Methodist Church, to be used for the purpose of repairing and painting the buildings on the church property.

At the time of the execution of the will, and the death of the testator, there was in force in the State of Florida section 20 of the Probate Act of 1933 which provided that if a testator dies leaving issue of his body, or an adopted child, or the lineal descendants of either, or a spouse, and the will of such testator devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, charitable, literary, scientific, religious or missionary institution, corporation or association or purpose, or to this State, or to any other state or country, or to a person in trust for any such purpose or beneficiary, whether such trust appears on the face of the instrument making such devise or request, or not, such will as to such devise or bequest shall be invalid unless it was duly executed at least six months prior to the death of the testator. See Sec. 731.19 Florida Statutes, 1941.

The will was admitted to probate in the County Judge's Court of Highlands County on December 5, 1938, and the widow duly qualified as executrix. On September 7, 1939, she died, before administration of the estate had been fully completed. On April 24, 1940, Mary Emma Payne was appointed administratrix with the will annexed of the property, goods and chattels of the estate of P. T. Richards not administered. Among the assets of the estate coming into her hands as personal representative were the contract and mortgage above referred to, upon which certain moneys were still due and owing.

On September 16, 1941, the Trustees of the Lake Placid Methodist Church filed their petition in the County Judge's Court of Highlands County reciting the facts we have narrated and alleging that as trustees for the remainderman, Lake Placid Methodist Church, they are entitled to the contract and mortgage and the proceeds thereof, but that the administratrix c.t.a.d.b.n. refuses to turn the same over to them because of the effect of section 20 of the Probate Act upon attempted devises and bequests re religious institutions made within six months after the death of the testator. The prayer of the petition is that the court construe the will so far as it pertains to the petitions, declare the rights of the petitioners thereunder, and direct

and require the personal representatives to account for and disburse to petitioners the proceeds of the contract and mortgage. On motion to strike filed by the personal representative, the County Judge dismissed the petition without leave to amend. Upon appeal taken by the trustees, the Circuit Court of Highlands County affirmed the order of the County Judge, holding that upon the facts averred in the petition the bequest to the trustees was null and void under section 20 of the Probate Act. This appeal is from that decree.

By their final assignment of error the appellants question the constitutionality of section 20 of the Probate Act, contending that the statute is a violation of the organic law in that it deprives the testator and the legatees of the right to receive, enjoy and dispose of property without due process of law, and denies them the equal protection of the law in the acquisition and disposition of property. The contention is without merit. The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. Nowhere in the Federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication. And except as the power to will property has been limited indirectly by Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. Therefore, the right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation. Accordingly, the right is at all times subject to regulation and control by the legislative authority which creates it. The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class or fixing the time which must ensue subsequent to the execution of the will before gifts to a particular class shall be deemed

valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated. *Thomas* vs. *Williamson*, 51 Fla. 352, 40 So. 831, 834; *Patton* vs. *Patton*, 39 Ohio St. 590, 596; In re Noyes Estate, 40 Mont. 178, 105 Pac. 1013; In re Beck's Estate, 44 Mont. 561, 121 Pac. 784; In re Walker's Estate, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. R. 104; Redfern on Wills and Administration of Estates in Florida, pp. 42 et seq.

The next question raised on appeal is whether anyone other than the appellants may take the subject matter of the bequest by virtue of the provisions of section 731.19, Florida Statutes, 1941; the testator having died within six months after the execution of his will leaving surviving him only his spouse, who likewise died shortly thereafter, the subject matter of the bequest then passing into the hands of the administratrix c.t.a.d.b.n. as unadministered assets of the testator.

This is a case of first impression in this jurisdiction. The question as presented calls for the construction of the statute involved. For if it be determined that all bequests to benevolent, charitable, educational or religious institutions made under the circumstances accompanied by the statute are absolutely void, that will put an end to this controversy without further considerations, because, all such bequests being void, the subject matter of this litigation is intestate property which descended in accordance with the statute of descent and distribution upon the death of the testator. On the other hand, if it be our construction that under the statute such bequests are voidable only, at the election of those within the class of persons against whom the statute says such bequests shall be invalid, then whether such legacy vested in the trustees will necessarily depend upon the facts of the case.

Our statute is not a mortmain act. The legislature never intended by the enactment of the statute to place any restriction upon the right of benevolent, charitable, educational, or religious institutions to take and hold property; but only to place a limitation upon the right of testators

to dispose of their property to such institutions when the conditions that are detailed in the statute exist. The purpose of the statute is clear; it is to protect the widow and children from improvident gifts made to their neglect by the testator; the design of the statute being obviously to prevent testators who may be laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty. See *Ruple* vs. *Hiram College,* 35 Ohio App. 8, 171 N. E. 417; In re Dwyer's estate, 159 Cal. 680, 115 Pac. 242; 10 Am. Jur. pp. 601-602; 68 C. J. p. 547, Sec. 167; Page on Wills 2d Ed. Sec. 30.

Whether the legislative philosophy behind such enactment is sound may be debatable. But the power of the legislature to enact such a statute may not be doubted. In construing the statute, however, it must be remembered that by other statutes in this state every person, male or female, married or single, who is at least eighteen years of age and who is of sound mind may make a will (Sec. 731.04, Florida Statutes, 1941) especially as to homestead and dower rights, such person may ordinarily dispose of their property in this jurisdiction in any manner that they may see fit. Section 20 of the Probate Act places a serious restraint upon this otherwise virtually absolute power of testamentary disposition now accorded the citizen by declaring that under certain specified situations testamentary gifts shall be invalid. Being a limitation upon the board statutory right or privilege given to all people universally to dispose of their accumulations at death according to their individual desires, the statute should be given such construction only as will secure full protection to those persons designed to be shielded by its provisions (*Thomas* v. *Board of Trustees,* 70 Ohio State 92, 70 N. E. 896; *Ruple* v. *Hiram College,* 35 Ohio App. 8, 171 N. E. 417) and yet at the same time allow as much effect as possible to be given to the cardinal rule for the construction of wills; that the intention of the testator shall prevail unless violative of some positive or settled rule of law to the contrary.

Giving the statute such construction, it is our view that the fact of the existence of issue of the body of the testator,

or adopted children, or lineal descendants or either, or a spouse, does not render a testamentary bequest made to a benevolent, charitable, educational, or religious institution within six months of the death of the *testato ipso facto* void but voidable only, at the election of the spouse, or children, blood or adopted, or their lineal descendants. The prohibition of the statute not being made in the public interest but only for the prevention of that which the legislature has regarded as a private wrong, and no contrary principles of right or public policy being involved, those for whose benefit the statute was enacted may waive or relinquish the protection afforded there-y, if they are of a mind to do so, and ratify or confirm a bequest which but for the mere absence of a sufficient period of time between the execution of the will and the death of the testator would be absolutely valid. Page on Wills 2d Ed. Sec. 31; *Folsom et al* v. *Board of Trustees, Ohio State University*, 210 III. 404, 71 NE. 384; *Thomas* v. *Board Trustees,* 70 Ohio St. 92, 70 N. E. 896; *Trustees of Amherst College* v. *Ritch,* 151 N. Y. 282, 355, 45 N. E. 876, 891, 37 L. R. A. 305; Re Ellis' Estate, 264 N. Y. 349, 191 N. E. 12, 93 A. L. R. 1380; *Karolusson* v. *Paonessa,* 207 Iowa 127, 222 N. W. 431.

Whether in a given case there has been a waiver or relinquishment of the statute by one coming within its protective features, or a ratification or confirmation of the bequest by one entitled to ratify or confirm, is a question of fact to be determined as all other questions of fact are determined in appropriate proceedings. In the present case the Trustees of the Lake Placid Methodist Church have pressed their claim to the subject matter of the bequest in the hands of the administratrix c.t.a.d.b.n. by originating a proceeding in the County Judge's Court under its probate jurisdiction to entertain direct proceedings for the construction of wills, and to require payment and delivery of legacies of distributive shares before final settlement of accounts. See Secs. 77, 159, 160, Probate Act, 1933 (Secs. 732.41, 734.02, 734.03, Florida Statutes, 1941). From the record in the case it appears that at the time of the death of Isabelle Richards, the widow and executrix under the will of P. T. Richards, deceased, the estate of the testator had not been

entirely administered; hence, it became necessary for a personal representative to be appointed to complete administration of the estate. Mary Emma Payne was appointed by the court and duly qualified as administratrix c.t.a.d.b.n. of the estate of P. T. Richards, and the unadministered assets of his estate came into her hands to be held by her in her representative capacity for the payment of debts of the deceased, and the eventual discharges of legacies created by the last will and testament. During the pendency of the administration and before final settlement of accounts this present proceeding was instituted by the Trustees of the Lake Placid Methodist Church filing a petition in the county judge's court for the construction of the will under which they claimed, for a declaration of their rights thereunder, and for an order requiring the subject matter of the legacy to be turned over to them. The petition recited the controversy between the parties and prayed for a construction of the will and a declaration of the rights of the parties in the light of the statute. Thus was squarely raised by the trustees themselves the validity of a charitable bequest which appeared valid on the face of the will but which was invalid by the words of the statute. The administratrix c.t.a.d.b.n. was made a party respondent and required to answer the petition. Under those circumstances she had the right—indeed it was her duty—to question whether the deceased spouse (the only person within the protected class who was in esse at the death of the testator) had during her lifetime waived or relinquished the protection of the statute or had ratified or confirmed the bequest which otherwise was invalid as to her. The administratrix c.t.a.d.b.n. saw fit to raise the question by filing motion to strike the petition; which had the effect of admitting the truth of all facts well pleaded.

On the face of the petition the bequest to the trustees of Lake Placid Methodist Church was invalid under the statute, so far as Isabelle Richards was concerned. Before the trustees could have prevailed under the circumstances it was incumbent upon them to show that Isabelle Richards had waived or relinquished the protection of the statute, or had in some manner rectified or confirmed the bequest

which was as to her was otherwise invalid. The trustees failed to made such facts appear. There was no error, therefore, in the judgment entered by the Circuit Court confirming the order of the County Judge's Court of Highlands County.

Judgment affirmed.

Brown, Chapman and Adams, J. J., Concur.

Buford, C. J. and Terrell, J., Dissent.